JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 44/87

BEFORE: The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Downer, J.A.
The Hon. Mr. Justice Gordon, J.A. (Ag.)

BETWEEN	BEVERLEY DRYDEN	APPELLANT/DEFENDANT
AND	WINSTON LAYNE (an infant by next friend Stanley Layne)	RESPONDENT/PLAINTIFF

D. Morrison for Appellant

H. Dale for Respondent

May 10, 11, & June 12, 1989

CAMPBELL, J.A.

On March 25, 1987 Malcolm J assessed General Damages in favour of the respondent for personal injuries suffered in the sum of Seventy Thousand Dollars ($70,000.00.) He itemised this sum thus:

"Re General Damages:

Pain and suffering	$20,000.00
Disability	25,000.00
Scarring and loss of Amenities	25,000.00"

In United Dairy Farmers Ltd v. Lloyd Goulbourne C.A. 65/81 (unreported) dated January 27, 1984, this court emphasized that the separate award of damages for physical, mental, or intellectual disability or impairment especially where this is substantial in addition to awards for pain and suffering, loss of amenities, loss of earning capacity, loss of prospective earnings, future medical, nursing and

other expenses or for any other consequence of the disability, as appropriate, amounts to a duplication of the award. This is so, because a physical injury without consequences would attract only a nominal award. It is the consequence of the disability which really measures the loss for which the disabled is to be compensated.

There is authoritative support for this opinion in H. West & Son Ltd v. Shephard (1964) A.C. 326 where Lord Reid at p. 340 - 341 had this to say:

> "The man whose injuries are permanent has to look forward to a life of frustration and handicap and he must be compensated, so far as money can do it, for that and for the mental strain and anxiety which results. There are two views about the true basis for this kind of compensation. One is that the man is simply being compensated for the loss of his leg or the impairment of his digestion. The other is that his real loss is not so much his physical injury as the loss of those opportunities to lead a full and normal life which are now denied to him by his physical condition - for the multitude of deprivations and even petty annoyances which he must tolerate. Unless I am prevented by authority, I would think that the ordinary man is, at least after the first few months, far less concerned about his physical injury than about the dislocation of his normal life. So I would think that compensation should be based much less on the nature of the injuries than on the extent of the injured man's consequential difficulties in his daily life."

It seems to me that the learned trial judge has erred in principle in making an award under the heading of "disability" and a further award under the heading of "scarring and loss of amenities" as the two heads overlap. There seems to be no logical reason for isolating the disability presumably constituted by the deformity of the leg for treatment as a separate head of damage.

However, as Mr. Dale has correctly submitted, even if the learned trial judge did assess on a wrong principle, it is the global figure which is important, and unless this figure is shown to be excessive the court ought not to disturb it.

The medical evidence given by Dr. McNeil Smith is that he saw the respondent then aged 12 years on May 9, 1983. This was some 4 years after the accident. The report which he had was of a compound fracture of the right leg. He saw a healed scar over the anterior aspect of the right leg with knock knee deformity of the leg. Xray confirmed that the respondent had suffered a fracture of the upper third of the right leg. The fracture had not been reduced. This resulted in the knock knee. The scarring was extensive. There was a scar at the fracture site 10" by 2" with two incision scars one above and one below this scar. There was also another scar 9" by 2" to the posterior and lateral side of the leg. The injury resulted in a growth disturbance with an overgrowth of the right leg which was bigger and ¼ inch longer than the left leg. Corrective surgery for the knock knee could be undertaken but it is uncertain whether it would remove the disability. The permanent potential disability is put at 15% of the right lower limb.

Both Mr. Morrison and Mr. Dale accept as established principles that personal injury awards should be reasonable and assessed with moderation and that so far as is possible comparable injuries should be compensated by comparable awards.

Thus, Mr. Morrison has referred us to Winston Grant v. Joseph Brown C.L. G 35/75 (assessed in February 1981), Wesley Graham v. Orrett Ellis C.L. G 148/76 (assessed January 1981) and Donald Johnson v. Stafford Evelyn C.L. J 183/82 (assessed February 1984) as cases where the injuries were comparable to the instant case in that they each involved fracture of the leg, they each involved substantially similar periods of hospitalization and surgical treatment. Two of the cases resulted in substantially similar permanent partial disability. He submitted that the awards in these cases appropriately adjusted upwards to allow for the internal depreciation in our currency would indicate an award in the present case of a sum within the range of $40,000.00 - $50,000,00 and that therefore the award of $70,000.00 was manifestly excessive.

Mr. Dale on the other hand relied on Martin Harris v. Central Fire and General Insurance Company Ltd C.L. H261/1984 (assessed in May 1986) and Paul Alexander v. Clinton Scott C.L. A066/1978 (assessed in October 1986) as cases in which the injuries were comparable to the present case. I do not think these cases provide any help as the injuries are manifestly more excessive.

The cases referred to by Mr. Morrison had not been tested on appeal to determine the opinion of the Appeal Court on the adequacy of the award as at the date of assessment. In Noel Gravesandy v. Neville Moore C.A. 44/85 (unreported) dated February 14, 1986 this court reduced an award of $90,000.00 to $50,000.00 for pain, suffering and loss of amenities where the injuries were less serious then in the present case though not substantially less. The injuries in that case comprised a compound fracture of the tibia and the fibula, deformity consisting of a shortening of the injured leg; there was however no stated percentage permanent partial disability as the doctor stated that an osteotomy (operation to realign bone) might have to be performed which would improve the leg but an evaluation had not then been done.

The assessment of damage had been made by the learned judge in 1985.

Applying an inflationary rate of 10% per annum for the two years ended December, 1985 and December 1986 an award for a similar injury in 1987 should be in the region of $60,000.00.

In Kenneth Kelly v. Michael Bennett C.A. 45/87 (unreported) dated March 2, 1988, this court increased an award for pain and suffering and loss of amenities from $26,000.00 to $75,000.00. The injuries and consequent disabilities comprised compound fracture of the right foot and ankle bone, laceration of inner aspect of right thigh leaving an ugly and unsightly scar. The permanent partial disability of right lower limb was 5 - 10%. That case in my view is not substantially different from the present one in so far as it involved fracture of the lower limb, laceration leaving scarring and residual disability.

In the light of the above two decisions of this Court, I cannot properly say that the global award of $70,000.00 by Malcolm J was so excessive as to entitle the Court to disturb it. The appeal is accordingly dismissed. The judgment of the Court below is affirmed. The respondent will have his costs in this Court, the same to be taxed if not agreed.

Downner, J.A.

I agree.

Gordon, J.A. (Ag.)

I agree.

[illegible]
(3) Winston Grand v. [illegible] Brown C.L.G. [illegible]
(4) Wesley Graham v. [illegible] C.L.G. 148/76 [illegible] Ltd CL #261/84
(5) Marlon [illegible]
(6) Paul Alexander v. Clinton Scott CL A 066/78 CA 44/85 (unrep) 14/2/86
(7) Neil [illegible] v. Neville [illegible] CA 45/87 (unrep) 2/3/88
(8) Kenneth Kelly v. Michael Barrett